

HAWAII ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

SUBTITLE 8

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

PART 1

GENERAL, LEGAL, AND ADMINISTRATIVE PROVISIONS
FOR OCCUPATIONAL SAFETY AND HEALTH

CHAPTER 55

RULES OF DOSH PRACTICE AND PROCEDURE CONCERNING
DOSH ACCESS TO EMPLOYEE MEDICAL RECORDS

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§12-55-1 General policy. DOSH access to employee medical records will in certain circumstances be important to the division's performance of its statutory functions. Medical records, however, contain personal details concerning the lives of employees. Due to the substantial personal privacy interests involved, DOSH authority to gain access to personally identifiable employee medical information shall be exercised only after DOSH has made a careful determination of its need for this information, and only with appropriate safeguards to protect individual privacy. Once this information is obtained, DOSH examination and use of it will be limited to only that information needed to accomplish the purpose of access. Personally identifiable employee medical information will be retained by DOSH only for so long as needed to accomplish the purpose of access, shall be kept secure while being used, and shall not be disclosed to other agencies or members of the public except in narrowly defined circumstances. [Eff. 7/12/82]

(Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-2 Scope and application. (a) This chapter establishes procedures to implement the general policy.

(b) This chapter applies to all requests by DOSH personnel to obtain access to records in order to examine or copy personally identifiable employee medical information, whether or not pursuant to the access provision of section 12-202-3(e).

(c) This chapter does not apply to DOSH access to, or the use of, aggregate employee medical information or medical records on individual employees which are not in a personally identifiable form nor to records required by chapter 12-52, to death certificates, nor to employee exposure records, including biological monitoring records treated by section 12-202-3, or by specific occupational safety and health standards such as exposure records.

(d) This chapter does not apply where DOSH compliance personnel conduct an examination of employee medical records solely to verify employer compliance with the medical surveillance recordkeeping requirements of an occupational safety and health standard, or with section 12-202-3. An examination of this nature shall be conducted on-site and, if requested, shall be conducted under the observation of the recordholder. The DOSH compliance personnel shall not record and take off-site any information from medical records other than documentation of the fact of compliance or non-compliance.

(e) This chapter does not apply to DOSH access to, or the use of, personally identifiable employee medical information obtained in the course of litigation.

(f) This chapter does not apply where a written directive by the director authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational safety and health standard, or of specific biological monitoring test results.

(g) Even if not covered by the terms of this chapter, all medically related information reported in a personally identifiable form shall be handled with appropriate discretion and care befitting all information concerning specific employees. There may be, for example, personal privacy interests involved which militate against disclosure of this kind of information to the public. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-3 Director. The director shall be responsible for the overall administration and implementation of the procedures contained in this chapter including making final DOSH determinations concerning:

- (1) Access to personally identifiable employee medical information, as provided in section 12-55-6; and
- (2) Inter-agency transfer or public disclosure of personally identifiable employee medical information, as provided in section 12-55-18.

[Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-4 DOSH medical records officer. The director shall designate a DOSH official with experience or training in the evaluation, use, and privacy protection of medical records to be the DOSH medical records officer. The DOSH medical records officer shall report directly to the director on matters concerning this section and shall be responsible for:

- (1) Making recommendations to the director as to the approval or denial of written access orders, pursuant to section 12-55-6;
 - (2) Ensuring that written access orders meet the requirements of sections 12-55-7 and 12-55-8;
 - (3) Responding to employee, or their designated representative, and employer objections concerning written access orders, as provided in section 12-55-11;
 - (4) Regulating the use of direct personal identifiers, as provided in section 12-55-12;
 - (5) Regulating internal DOSH use and security of personally identifiable employee medical information, pursuant to sections 12-55-13, 12-55-14, and 12-55-15;
 - (6) Ensuring that the results of DOSH analyses of personally identifiable medical information are communicated to employees, as provided in section 12-55-16;
 - (7) Preparing an annual report of DOSH's experience pursuant to section 12-55-17; and
 - (8) Ensuring that advance notice is given of intended inter-agency transfers or public disclosures, pursuant to section 12-55-18.
- [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-5 Principal DOSH investigator. The principal DOSH investigator shall be the DOSH employee, in each instance of access to personally identifiable employee medical information, who is made primarily responsible for ensuring that the examination and use of this information is performed in the manner prescribed by a written access order and the requirements of sections 12-55-6 through 12-55-18. When access is pursuant to a written access order, the principal DOSH investigator shall be professionally trained in medicine, public health, or allied fields such as epidemiology, toxicology, industrial hygiene, biostatistics, and environmental health. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-6 Requirement for written access order. Except as provided in section 12-55-9, each request by a DOSH representative to examine or copy personally identifiable employee medical information contained in a record held by an employer or other recordholder shall be made pursuant to a written access order which has been approved by the director upon the recommendation of the DOSH medical records officer. If deemed appropriate, a written access order may constitute or be accompanied by an administrative subpoena.
[Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-7 Approval criteria for written access order. Before approving a written access order, the director and the DOSH medical records officer shall determine that:

- (1) The medical information to be examined or copied is relevant to a statutory purpose and there is a need to gain access to this personally identifiable information;
 - (2) The personally identifiable medical information to be examined or copied is limited to only that information needed to accomplish the purpose for access; and
 - (3) The personnel authorized to review and analyze the personally identifiable medical information are limited to those who have a need for access and have appropriate professional qualifications.
- [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-8 Content of written access order. Each written access order shall state with reasonable particularity:

- (1) The statutory purposes for which access is sought;
 - (2) A general description of the kind of employee medical information that will be examined and why there is a need to examine personally identifiable information;
 - (3) Whether medical information will be examined on-site, and what type of information will be copied and taken off-site;
 - (4) The name, address, and phone number of the principal DOSH investigator and the names of any other authorized persons who are expected to review and analyze the medical information;
 - (5) The name, address, and phone number of the DOSH medical records officer; and
 - (6) The anticipated period of time during which DOSH expects to retain the employee medical information in a personally identifiable form.
- [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-9 Special situations concerning written access order. Written access orders need not be obtained to examine or copy personally identifiable employee medical information under the following circumstances:

- (1) If the specific written consent of an employee is obtained pursuant to section 12-202-3(e)(2)(B), and DOSH or a DOSH employee is listed on the authorization as the designated representative to receive the medical information, then a written access order need not be obtained. Whenever personally identifiable employee medical information is obtained through specific written consent and taken off-site, a principal DOSH investigator shall be promptly named to ensure protection of the information, and the DOSH medical records officer shall be notified of this person's identity. The personally identifiable medical information obtained shall be subject to the use and security requirements of sections 12-55-13 through 12-55-18.
- (2) A written access order need not be obtained where a DOSH staff or contract physician consults with an employer's physician concerning an occupational safety or health issue. In a situation of this nature, the DOSH physician may conduct on-site evaluation of employee medical records in consultation with the employer's physician, and may make personal notes of his or her findings. No employee medical records shall be taken off-site in the absence of a written access order or the specific written consent of an employee, and no notes of personally identifiable employee medical information made by the DOSH physician shall leave his or her control without the permission of the DOSH medical records officer. [Eff. 7/12/82; am 8/15/87]
(Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-10 Presentation of written access order and notice to employees.

(a) The principal DOSH investigator, or someone under the investigator's supervision, shall present at least two copies each of the written access order and an accompanying cover letter to the employer prior to examining or obtaining medical information subject to a written access order. At least one copy of the written access order shall not identify specific employees by direct personal identifier. The accompanying cover letter shall summarize the requirements of this section and indicate that questions or objections concerning the written access order may be directed to the DOSH principal investigator or to the DOSH medical records officer.

(b) The principal DOSH investigator shall promptly present a copy of the written access order (which does not identify specific employees by direct personal identifier) and its accompanying cover letter to each designated representative of the employees whose medical records are subject to the written access order.

(c) The principal DOSH investigator shall indicate that the employer must promptly post a copy of the written access order which does not identify specific employees by direct personal identifier, as well as post its accompanying cover letter. See section 12-202-3(d)(3)(B).

(d) The principal DOSH investigator shall discuss with any collective bargaining agent and with the employer the appropriateness of individual notice to employees affected by the written access order. Where it is agreed that individual notice is appropriate, the principal DOSH investigator shall promptly provide to the employer an adequate number of copies of the written access order (which does not identify specific employees by direct personal identifier) and its accompanying cover letter to enable the employer either to individually notify each employee or to place a copy in each employee's medical file. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4)
(Imp: HRS §396-4)

§12-55-11 Objections concerning a written access order. All employees, or their designated representatives, and an employer's written objections concerning access to records pursuant to a written access order shall be transmitted to the DOSH medical records officer. Unless DOSH decides otherwise, access to the records shall proceed without delay notwithstanding the lodging of an objection. The DOSH medical records officer shall respond in writing to each employee's or their designated representative's written objection to DOSH access. Where appropriate, the DOSH medical records officer may revoke a written access order and direct that any medical information obtained by it be returned to the original recordholder or destroyed. The principal DOSH investigator shall ensure that such instructions by the DOSH medical records officer are promptly implemented. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-12 Removal of direct personal identifiers. Whenever employee medical information obtained pursuant to a written access order is taken off-site with direct personal identifiers included, the principal DOSH investigator shall, unless otherwise authorized by the DOSH medical records officer, promptly separate all direct personal identifiers from the medical information, and code the medical information and the list of direct identifiers with a unique identifying number for each employee. The medical information with its numerical code shall thereafter be used and kept secured as though still in a directly identifiable form. The principal DOSH investigator shall also hand deliver or mail the list of direct personal identifiers with their corresponding numerical codes to the DOSH medical records officer. The DOSH medical records officer shall thereafter limit the use and distribution of the list of coded identifiers to those with a need to know its contents. [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-13 Internal agency use of personal identifiable employee medical information. (a) The principal DOSH investigator shall in each instance of access be primarily responsible for ensuring that personally identifiable employee medical information is used and kept secured in accordance with this section.

(b) The principal DOSH investigator, the DOSH medical records officer, the director, and any other authorized person listed on a written access order may permit the examination or use of personal identifiable employee medical information by DOSH employees and contractors who have a need for access, and appropriate qualifications, for the purpose for which they are using the information. No DOSH employee or contractor is authorized to examine or otherwise use personally identifiable employee medical information unless so permitted.

(c) Where a need exists, access to personally identifiable employee medical information may be provided to the attorney general and to DOSH contractors who are physicians or who have contractually agreed to abide by the requirements of this section, implementing DOSH directives, and DOSH instructions.

(d) DOSH employees and contractors are only authorized to use personal identifiable employee medical information for the purposes for which it was obtained, unless the specific written consent of an employee is obtained as to a secondary purpose, or the procedures of sections 12-55-6 through 12-55-12 are repeated with respect to the secondary purpose.

(e) Whenever practicable, the examination of personally identifiable employee medical information shall be performed on-site with a minimum of medical information taken off-site in a personal identifiable form.

[Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-14 Security procedures. (a) DOSH files containing personally identifiable employee medical information shall be segregated from other agency files. When not in active use, files containing this information shall be kept secured in a locked cabinet or vault.

(b) The DOSH medical records officer and the principal DOSH investigator shall each maintain a log of uses and transfers of personal identifiable employee medical information and lists of coded direct personal identifiers, except for necessary uses by staff under their direct personal supervision.

(c) The photocopying or other duplication of personally identifiable employee medical information shall be kept to the minimum necessary to accomplish the purposes for which the information was obtained.

(d) The protective measures established by this section apply to all worksheets, duplicate copies, or other agency documents containing personally identifiable employee medical information.

(e) Intra-agency transfers of personally identifiable employee medical information shall be by hand delivery, United States mail, or equally

§12-55-15 Retention and destruction of records. (a) Consistent with DOSH records disposition programs, personally identifiable employee medical information and lists of coded direct personal identifiers shall be destroyed or returned to the original recordholder when no longer needed for the purposes for which they were obtained.

(b) Personally identifiable employee medical information which is not in current use but may be needed for future use shall be transferred to the DOSH medical records officer. The DOSH medical records officer shall conduct an annual review of all centrally-held information to determine which information is no longer needed for the purposes for which it was obtained. [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-16 Agency analysis using personal identifiable employee medical information. The DOSH medical records officer shall, as appropriate, assure that the results of a DOSH analysis using personally identifiable employee medical information are communicated to the employees whose personal medical information was used as a part of the analysis. [Eff. 7/12/82]
(Auth: HRS §396-4) (Imp: HRS §396-4)

§12-55-17 Annual report. The DOSH medical records officer shall on an annual basis review DOSH's experience under this section during the previous year, and prepare a report to the director which shall be made available to the public. This report shall discuss:

- (1) The number of written access orders approved and a summary of the purposes for access;
- (2) The nature and disposition of employee, or their designated representative, and employer written objections concerning DOSH access to personally identifiable employee medical information; and
- (3) The nature and disposition of requests for inter-agency transfer or public disclosure of personally identifiable employee medical information. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4)
(Imp: HRS §396-4)

§12-55-18 Inter-agency transfer and public disclosure. (a) Personal identifiable employee medical information shall not be transferred to another agency or office outside of DOSH (other than to the attorney general) or disclosed to the public (other than to the affected employee or the original recordholder) except when required by law or when approved by the director.

(b) Except as provided in subsection (c) below, the director shall not approve a request for an inter-agency transfer of personal identifiable employee medical information, for which the employees have not given their consent, unless the request is by a public health agency which:

- (1) Needs the requested information in a personally identifiable form for a substantial public health purpose;
- (2) Will not use the requested information to make individual determinations concerning affected employees which could be to their detriment;
- (3) Has regulations or established written procedures providing protection for personally identifiable medical information substantially equivalent to that of this chapter; and
- (4) Satisfies an exemption to the Privacy Act to the extent that the Privacy Act applies to the requested information. See 5 U.S.C. 552a(b); 29 CFR 70a.3.

(c) Upon the approval of the director, personally identifiable employee medical information may be transferred to:

- (1) The National Institute for Occupational Safety and Health (NIOSH); and
- (2) The State attorney general, when necessary, with respect to a specification under chapter 396, HRS.

(d) The director shall not approve a request for public disclosure of employee medical information containing direct personal identifiers unless there are compelling circumstances affecting the health or safety of an individual.

(e) The director shall not approve a request for public disclosure of employee medical information which contains information which could reasonably be used indirectly to identify specific employees when the disclosure would constitute a clearly unwarranted invasion of personal privacy. See, 5 U.S.C. 552(b)(6); 29 CFR 70.26.

(f) Except as to inter-agency transfers to NIOSH or the Department of Justice, the DOSH medical records officer shall ensure that advance notice is provided to any designated representative of the affected employees and to the employer on each occasion that DOSH intends to either transfer personally identifiable employee medical information to another agency or disclose it to a member of the public other than to an affected employee. When feasible, the DOSH medical records officer shall take reasonable steps to ensure that advance notice is provided to affected employees when the employee medical information to be transferred or disclosed contains direct personal identifiers. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4)
(Imp: HRS §396-4)